pursuant to O 33 r 5 of the Rules of the High Court 1980, it is my order that the defendant shall pay to the plaintiff the full amount covered by the letter of indemnity in respect of the Dirikon transaction. I adjourn the proceedings for counsel to work out the actual amount involved and to prepare a draft order for my approval.

Order accordingly.

Solicitors: *Skrine & Co; Shearn Delamore & Co.*

Reported by *Teoh Ai Lin*

Sarjit Singh Khaira v Government of the State of Sarawak & Anor

HIGH COURT (KUCHING) — CIVIL SUIT NO KG 126 OF 1989
HAIDAR J
9 FEBRUARY 1990

Civil Procedure — Writ — Striking out of writ and service — Whether no reasonable cause of action disclosed — Whether action frivolous and vexatious —Whether defendant improperly made a party — Rules of the High Court 1980, O 18 r 19(1)(a), (b), (d) & O 92 r 4 — Public Service Commission Rules 1964, rr 2 & 7

The plaintiff, a public service employee, was transferred by the second defendant to another department. He claimed to have been wrongfully dismissed from the service of the first defendant and also claimed arrears of pay. He sought a declaration that the second defendant acted wrongfully, in bad faith with ulterior motive in procuring the purported dismissal. The defendants applied to set aside the writ and service pursuant to O 18 r 19 and O 92 r 4 of the Rules of the High Court 1980.

Held, dismissing the defendants' application:

(1) The court accepted the opinion that the senior accounting officers' scheme to which the plaintiff belonged is not a common-user scheme. If so, then the purported exercise of the power of the second defendant under General Orders 40(1) may not be applicable in this case as the plaintiff is transferred to another department.

(2) Even assuming that the plaintiff was holding a common-user post, it would appear that the only authority that could transfer the plaintiff would be the Public Service Commission by virtue of art 36(1) of the State Constitution and r 7 of the Public Service Commission Rules 1964. It is patently clear that the purported powers of transfer claimed by the second defendant under the General Orders are not delegated to him as such by the Public Service Commission which the Public Service Commission could do by virtue of the powers conferred on it by art 37(3) of the State Constitution. In that event, the General Orders cannot override the express provision of the State Constitution and the Public Service Commission Codes 1964.

(3) The court was satisfied that there was a cause of action in the case. In view of the facts disclosed and on the line of authority relating to an O 18 application, the court was satisfied that this action was not frivolous or vexatious or an abuse of the process of the court. The issue of facts and law in respect of the case are matters that should be properly determined at the trial proper, and this was not an obvious and clear case for which O 18 can be applied.

(4) In respect of the alternative ground that the defendant should cease to be a party on the ground that he had been improperly or unnecessarily made a party, the action filed against the second defendant is in his personal capacity. The court was of the view that this is not a proper case for the exercise of its discretion under O 2. As to whether there has been any tort committed by the second defendant, the matters raised by both parties in their affidavits are mainly questions of fact to be decided at trial.

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 01-27-90.]

Cases referred to

1 *Zakaria bin Mohamed Esa* v *Dato Abdul Aziz bin Ahmad & Ors* [1985] 2 MLJ 222 (refd)
2 *Stephen Kalong Ningkan* v *Tun Abang Haji Openg & Anor (No 2)* [1967] 1 MLJ 46 (refd)
3 *Wenlock* v *Moloney & Ors* [1965] 2 All ER 871 (refd)
4 *Pengarah Pelajaran Wilayah Persekutuan & Ors* v *Loot Ting Yee* [1982] 1 MLJ 68 (distd)
5 *Public Service Tribunal Judgment* (Case No 57 of 1980) (unreported) (refd)
6 *Smith* v *East Elloe Rural District Council & Ors* [1956] AC 736 (refd)

Legislation referred to

Federal Constitution arts 35, 36(1), 132(2)
Public Service Tribunal Act 1977 s 2
Public Service Commission Rules 1964 rr 2, 7
Rules of the High Court 1980 O 15 r 6(2)(a), O 18 r 19(1)(a), (b), (d), O 56 r 2(2), O 92 r 4
Sarawak State Constitution art 37(3)

TO Thomas for the plaintiff.
A Hamid bin Mohd Yusof (Deputy State Attorney-General) for the first and second defendant.

Cur Adv Vult

Haidar J: Sarjit Singh Khaira, the plaintiff, filed this writ against the government of the State of Sarawak (first defendant) and Datuk Amar Bujang Mohammed Nor, the State Secretary (second defendant) for a declaration that he was wrongfully dismissed from the public service of the first defendant and that he is entitled to arrears of pay, etc. As against the second defendant knowingly acted wrongfully in bad faith with ulterior motive in procuring his purported dismissal.

The defendants entered conditional appearance on 5 September 1989 after obtaining leave from the court. On 6 September 1989, the defendants filed summons-in-chambers pursuant to O 18 r 19(1)(a)(b) and (d) and O 92 r 4 of the Rules of the High Court 1980 ('RHC') for an order to set aside the writ and service thereof. The grounds put forth by the defendants are:

(a) the writ and statement of claim delivered therewith disclose no reasonable cause of action against the first and second defendants or such action is frivolous and vexatious;
(b) that the proceedings against the first and second defendants are an abuse of the process of the court; or alternatively
(c) that the second defendant should cease to be a party to this action on the ground that the second defendant has been improperly or unnecesarily made a party.

The summons was supported by the affidavits of Datuk Amar Haji Bujang bin Mohd Nor, Datuk Polycarp Sim Cheng Mong, Michael Peter Donald Parker @ Michael Parker, Hj Bujang Mohidin bin Hj Jol and Abdul Razak bin Hj Mohd Tready.

I dismissed with costs the summons of the defendants on 6 December 1989 and pursuant to an application under O 56 r 2(2) of the RHC, I heard further arguments on 9 February 1990 wherein I affirmed the earlier order that I made on 6 December 1989. I now give my grounds.

No reasonable cause of action

It is in my view well established that it is only in plain and obvious cases that recourse should be had to the summary procedure under this provision. In this respect, Yusoff Mohamed J (as he then was) clearly stated the law in *Zakaria bin Mohamed Esa* v *Dato Abdul Aziz bin Ahmad & Ors*:[1]

> First, no reasonable cause of action. In considering this statement of claim as disclosing no reasonable cause of action, no evidence is admissible — see O 18 r 19, para (2). It is settled rule that the pleading must be read as a whole, each paragraph must be viewed in relation with the others and cannot be viewed in isolation and in *Peck* v *Russell* (1923) 4 FMSLR 32, 34 it was held there that the plaint and its documents alone should be considered and all the allegations in it should be assumed to be true.

At p 223, the learned judge went on to say:

> While repeating that *Peck* v *Russell* (1923) 4 FMSLR 32, 34 lays down the rule that all allegations in the statement of claim are presumed to be true and the court is not concerned at this stage of the proceedings whether those allegations are unfounded the point of law raised by the learned senior federal counsel, if it is considered sufficiently important, clearly requires serious discussion and the proper course open to the defendants would be to take an objection on the pleadings and the point set down for argument under O 33 r 2, Rules of the High Court 1980 — see *Hubbuck* v *Wilkinson* [1899] 1 QB 86, 91.

According to *Mallal's Supreme Court Practice* (2nd Ed) at p 220, 'If there is an issue to be tried it can only be tried by the action pursuing its normal course and being heard in open court: *Low Yat* v *Grace* [1947] MLJ 115.' Further, on the same page, it is stated, 'the mere fact that the case is weak and unlikely to succeed is no ground for striking out the statement of claim'.

Frivolous and vexatious

By these words are meant cases which are obviously unsustainable (see p 322, para 18/19/15 of *The Supreme Court Practice 1988* (Vol 1)). Pike CJ (Borneo) in *Stephen Kalong Ningkan* v *Tun Abang Haji Openg & Anor (No 2)*[2] at p 47 said:

> The burden upon an applicant who asks that a writ of summons and statement of claim be struck out is a heavy one. He must be able to show that the action must fail or that for some other reason it is an abuse of the process of the court or is frivolous or vexatious. See *Goodson* v *Grievson* [1908] 1 KB 761. This case has stood the test of time and was expressly approved in *Charles Forte Investment Ltd* v *Amanda* [1963] 3 WLR 662. Lord Justice Wilmer at p 666 says:
>
> 'As to the circumstances in which the inherent jurisdiction of the court may be invoked, I entirely accept the judge's caution, which he quoted from the *Annual Practice* 1963, p 577, that this is a jurisdiction to be exercised with great circumspection. Mr Instone this morning has properly shown our attention to an authority, *Goodson* v *Grierson*, which expresses the test to be applied as being whether it is impossible for the party concerned to succeed on his claim.'

Abuse of the process of the court

This term connotes that the process of the court must be used bona fide and properly and must not be abused. In this respect, Dankwerts LJ in *Wenlock* v *Moloney & Ors*[3] at p 874 said:

> The position is very clearly expressed by Lord Herschell in *Lawrence* v *Lord Norreys* (1890) 15 App Cas 210. He said:
>
> 'It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved.'
>
> In that case, the application succeeded in the Court of Appeal and the House of Lords because those courts concluded that the story told in the proceedings was a myth, and so the action was an abuse of the process of the court. It was a plain and obvious case. The position under two former rules (3) has been incorporated in the present RSC O 18 r 19 of the new rules. There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise fo that power.

Having thus set out the principles governing an application under O 18 r 19 of RHC, I will then apply them to the pleadings and the facts of this case. The thrust of the argument of counsel for the defendants is that the issue is essentially one of transfer and therefore it is non-justiciable. He relied heavily on the Federal Court case of

Pengarah Pelajaran Wilayah Persekutuan & Ors v *Loot Ting Yee*[4] in support thereof. To begin with, *Loot Ting Yee*'s case[4] is solely confined to the issue of whether the power of the government to transfer its officers is reviewable by the courts. In this respect, the Federal Court at p 69 said:

> In our view as a civil servant holds office during pleasure, not only the length of his service is subject to pleasure but the place and time of his service is also similarly subject to pleasure. The only difference is that as regards dismissal and reduction in rank procedural safeguards contained in art 135 must be observed, whereas in cases of transfer and other matters so such safeguards need be followed. Thus whether a civil servant should be transferred, and if so where and when the transfer is to be made are matters for the government to decide. No useful purpose could thus be served in this case by holding a full trial of the respondent's allegations of mala fide and unreasonableness.

In the present case, the plaintiff is not merely challenging the power of the defendants to transfer him, pure and simple as in *Loot Ting Yee*'s case,[4] but whether he is liable to be transferred on the ground that he was not in the common-user service (see para 17(2) of the statement of claim) and thereby the resultant dismissal action of the plaintiff is brought into question. Therefore the facts of the present case are not on all fours with *Loot Ting Yee*'s case[4] relied on by the defendants.

Whilst it is true that the *Public Service Tribunal Judgment*[5] is confined only to the issue of an anomaly within the meaning of s 2 of the Public Service Tribunal Act 1977 and the issue of transferability is not an anomaly, I do not see why I should not accept the opinion expressed therein that the senior accounting officers' scheme (to which the plaintiff belongs) is not a common-user. If that be the case, then the purported exercise of the power of the second defendant under General Orders 40(1) may not be applicable in this case as the plaintiff is transferred to another department, ie the Treasury. In any event, General Orders 40(1) is stated to be 'subject to the provisions of the Public Service Commission Rules'. Under cl 2 of art 132 of the Federal Constitution, it is provided that the qualifications for appointment and conditions of service of persons in the public service of any state may be regulated by state law and, subject to the provisions of any such law, by the Ruler or Yang di-Pertua Negeri of the State. The State Public Service Commission is established under art 35 of the State Constitution and its functions governed by art 36 which reads:

> (1) Subject to the provisions of the Federal Constitution and of this Constitution, it shall be the duty of the Commission to appoint, confirm, emplace on the permanent or pensionable establishment, promote, *transfer* and exercise disciplinary control over members of the public service. (Emphasis added.)

According to r 2 of the Public Service Commission Rules 1964, 'transfer' means:

> (a) the conferment upon a person in the public service of the State of a public office in any department other than that in which he last held substantive appointment;

Rule 7 of the Public Service Commission Rules 1964 provides the procedure, inter alia, for transfer. It was submitted by counsel for the plaintiff that the transfer of the plaintiff in this case fell within r 2 thereof under the interpretation 'transfer'.

Even assuming that the plaintiff was holding a common-user post, it would appear that the only authority that could transfer the plaintiff would be the Public Service Commission by virtue of art 36(1) of the State Constitution and r 7 of the Public Service Commission Rules 1964. It was conceded by counsel for the defendants that the General Orders for which the second defendant purported to exercise have no force of law. Be that as it may, it is patently clear that the purported powers of transfer claimed by the second defendant under the General Orders are not delegated to him as such by the Public Service Commission which the Public Service Commission could very well do by virtue of the powers conferred on it by art 37(3) of the State Constitution. In that event, surely the General Orders, in my view, cannot override the express provisions of the State Constitution and the Public Service Commission Rules 1964.

Apart from the issue of the competency relating to the transfer order, the plaintiff is also challenging the validity of his purported dismissal. Counsel for the defendants in relying on *Loot Ting Yee*'s case[4] omitted, inadvertently or otherwise, to quote the following relevant passage of the Federal Court:

> The only difference is that as regards dismissal and reduction in rank procedural safeguards contained in art 135 must be observed, whereas in cases of transfer and other matters no such safeguards need be followed.

The other passage that was not highlighted by counsel for the defendants is:

> As regards punishment, there is nothing in the Constitution which entitles an officer to bring his grievances before the court whenever he is punished unless and until the punishment complained of amounts to a dismissal or reduction in rank.

In fact in relying on the passage 'if an officer can be dismissed at pleasure similarly he can be asked to serve anywhere at pleasure', the words 'subject only to observance of art 135' were conveniently left out. Further, the Federal Court by using the word 'punishment' in inverted commas would signify that the said word was used with qualification.

It thus appears quite clear that apart from the issue of the validity of the transfer, his purported dismissal entitles him, in the words of the Federal Court, 'to bring his grievances before the court'.

The express averments of wrongdoings show how the purported dismissal was brought to the court. For the reasons set out by me I was more than satisfied that there is a cause of action in this case. In view of the facts disclosed and on the line of authority relating to O 18 applications, I was more than satisfied also that this action is not frivolous or vexatious or an abuse of the process of the court. The issue of facts and law in respect of this case are matters that should be properly determined at the trial proper and this case is not an obvious and clear case for which O 18 can be applied.

In respect of the alternative ground, ie the second defendant should cease to be a party on the ground that the second defendant has been improperly or unnecessarily made a party, Mr Thomas, counsel for the plaintiff, submitted that the summons is only confined to an order to set aside the writ and the service thereof. There is no suggestion of misjoinder of parties under O 15 r 6(2)(a). Encik Hamid, counsel for the second defendant, urged the court to treat the error as an irregularity and invoke its powers under O 2. Mr Thomas submitted that the action filed against the second defendant is in his personal capacity under tort and relied on *Halsbury's Laws of England* (4th Ed) under the caption 'Action for breach of common law duties' at p 187 and the case of *Smith* v *East Elloe Rural District Council & Ors*.[6] I am of the opinion that this is not the proper case for me to exercise my discretion under O 2 and I struck out the alternative ground accordingly. As to whether there has been any tort committed by the second defendant, in my view, the matters raised by both parties in their affidavits are mainly questions of fact to be decided at the trial.

In the circumstances and for the reasons set out by me, I affirmed the earlier order that I made in chambers and, accordingly, dismissed the defendants' summons with costs.

Summons dismissed.

Solicitors: *TO Thomas & Co Advocates.*

Reported by *Azra Moiz*

Malayan United Bank Bhd v Straits Central Agencies (Sarawak) Sdn Bhd & Anor

HIGH COURT (KUCHING) — SUIT NO KG 214 OF 1988
HAIDAR J
6 JANUARY 1990

Civil Procedure — Appeal — Raising new issue — Discretion of appellate court — Technical ground — Rules of the High Court 1980, O 56 — Courts of Judicature Act 1964, ss 29 & 69

The plaintiffs appealed against the decision of the registrar dismissing their application for summary judgment against the second defendant. At the outset of the appeal, the second defendant raised a preliminary point that there had been an inordinate delay in bringing the application for summary judgment. This issue had not been taken up before the registrar.

Held, allowing the plaintiffs' appeal:

(1) A civil appeal operates by way of rehearing, and the appellate court has a discretion to allow a point of law or issue not otherwise raised at the court below to be raised on appeal. This discretion will only be exercised when the point raised relates to jurisdiction or illegality and not mere technicality.

(2) The issue of delay in the filing of the O 14 application was a procedural irregularity which could be waived under O 2 of the Rules of the High Court 1980. The second defendant had waived it by not raising the point before the registrar.

(3) It was therefore not open to the second defendant to avail himself of the irregularity on appeal.

Cases referred to

1 *Blundell* v *Rimmer* [1971] 1 All ER 1072 (refd)
2 *A-G of the Straits Settlements* v *Pang Ah Yew* [1934] MLJ 184 (refd)
3 *Central Bank of India Ltd* v *Guardian Assurance Co Ltd* [1936] MLJ 163 (refd)
4 *Hassan & Anor* v *Wan Ishak & Ors* [1961] MLJ 45 (refd)
5 *S Mariappan* v *Government of Malaysia* [1983] 2 MLJ 340 (folld)
6 *Muniandy & Anor* v *Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416 (folld)
7 *Burns* v *Devon's Iron Works Ltd* [1961] SC 102 (refd)
8 *Krakauer* v *Katz* [1954] 1 All ER 244 (folld)

Legislation referred to

Courts of Judicature Act 1964 ss 29, 69
Rules of the High Court 1980 O 2, O 56

John Lim for the plaintiffs.
Francis Ting for the second defendant.

Cur Adv Vult

Haidar J: The plaintiffs in this case appealed under O 56 r 1(1) of the Rules of the High Court 1980 ('RHC') against the decision of the senior assistant registrar dismissing the plaintiff's application (encl 22) for judgment against the second defendant under O 14 r 1 and O 18 r 19(1) of RHC.

At the outset of the hearing of the appeal, counsel for the second defendant raised a preliminary point in that